

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs July 30, 2008

**STATE OF TENNESSEE v. JEROME DAVID BAILEY, ALIAS**

**Appeal from the Criminal Court for Knox County  
No. 84003     Kenneth F. Irvine, Judge**

---

**No. E2007-02764-CCA-R3-CD - Filed September 30, 2008**

---

This is an appeal of the manner of service of the sentence imposed by the Knox County Criminal Court. The Defendant-Appellant, Jerome David Bailey ("Bailey"), pled guilty to two counts of aggravated assault, a Class C felony. As a Range I, standard offender, Bailey agreed upon a five-year term of imprisonment for each aggravated assault conviction, to be served consecutively, for an effective sentence of ten years at thirty percent in the Department of Correction. The manner of service, however, was left to be determined by the trial court. Following a sentencing hearing, the trial court ordered Bailey to serve his sentence in confinement. Bailey appeals the trial court's denial of alternative sentencing and contends that he should have received full probation or a split sentence of confinement and probation. We affirm the trial court's judgments.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed**

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Leslie M. Jeffress, Knoxville, Tennessee for the appellant, Jerome David Bailey.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Philip H. Morton, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

At the guilty plea hearing, the prosecutor outlined the facts regarding Bailey's convictions:

[T]he proof would show that on January 18<sup>th</sup>, 2006, the victims in this case Kimberly Tate and Cheryl [Snyder]<sup>1</sup> were working at the Fashion Bug, a clothing store, on Broadway here in the City of Knoxville. Around the hour of nine o'clock as they were preparing to close the store, Ms. Tate was vacuuming the floor and Ms. [Snyder] was in the back of the store breaking down some boxes. And shortly before nine this defendant opened the door forcefully, entered the store, saw Ms. Tate, [and] ran toward her stating he was going to kill her. He had his hand in his pocket and as he was running toward her he removed a large wooden object, [a] club type object, from his pocket and began to strike Ms. Tate with that object causing injury to her and causing damage to the items being offered for sale in that store.

Ms. [Snyder] heard the commotion and came from where she was in the back and saw this defendant attacking Ms. Tate. She knew who he was, he had been in the store several times before. She screamed for him to stop [and] that she was calling the police. She retrieved the cordless phone belonging to the business in an attempt to do that. This defendant then turned on her and said he was going to kill her too. And thereafter struck her with the wooden object . . . knocking the phone out of her hand and causing it to fly off some distance away where she could not retrieve it. [He] [k]nocked her to the ground, momentarily stunned her, [and] caused a large gashing cut on the back of her head.

The injuries to Ms. Tate included a cut on her cheek that required stitches. The injury to Ms. [Snyder] required four staples in the back of her head. Ms. [Snyder] also suffered other injuries as a result of the attack [and] the fall that came with it. She's had and probably [currently] has some permanent disability in her shoulder area as a result of this attack.

The two victims after they were struck repeatedly by this defendant were able to eventually make their way back to the bathroom area of this store and lock themselves in there. Ms. [Snyder] had retrieved her cell phone and was able to call 9-1-1. They did that and waited until the police arrived. By the time the police arrived this defendant had fled the scene . . . and was arrested several days later on these charges.

Further proof would show . . . all this took place here in Knox County.

Although the state felt it necessary for only one victim to testify, both victims from the night of the offense, Cheryl Snyder and Kimberly Tate, were present and prepared to testify at sentencing. Snyder, the store manager, stated she was working with Tate, the store co-manager, on the night of the offense. Snyder witnessed Bailey come into the store holding "a large wooden object, similar to a dowel rod or a very large rolling pin without the handles." She recognized Bailey "right away"

---

<sup>1</sup>Victim Cheryl Snyder's name is spelled with a "y" in the indictment, but the transcript and other parts of the record spell her name as "Snider" using an "i."

because he had previously dated Tate. She heard “screams and saw [Bailey] chasing [Tate] down the inner aisle with it . . .” Bailey then turned on Snyder and “hit [her] on the left side of the head, knocking [her] to [her] knees, then hit [her] again on the back of the head and cut a gash in [her] head. At the hospital, they had to put four staples in the gash to repair it.” Snyder stated that “had God not given [her] the strength and the courage to [retrieve her cell phone to call 9-1-1] that night Kimberly and I would both have died.”

As a result of this assault, Snyder was diagnosed with direct-impact whiplash and post-traumatic stress disorder. She suffered from nightmares, flashbacks, and mood swings, all of which affected her relationships with her friends and family. She had surgery due to the extreme shoulder pain and received physical therapy.

Snyder explained that she had been receiving worker’s compensation checks for her injuries, which totaled only two-thirds of the value of her salary, not including the bonuses. She stated that she lost nearly twenty thousand dollars in salary and nearly fifteen thousand dollars in bonuses and other compensation following this incident. In addition, she lost her health insurance and life insurance. Furthermore, she testified that she and her fiancé had to close their profitable coffee shop because of her injuries.

Even though Bailey did not attempt to enter the locked door to the restroom where Snyder and Tate were hiding after the assault, Snyder opined that Bailey should “receive the maximum sentence with no . . . chance of parole” and stated that “he is a violent man and should not be given any special privileges or released early.”

Following Snyder’s testimony, the prosecutor summarized Bailey’s lengthy criminal history which included five domestic assault convictions. In 1989, Bailey was charged with aggravated assault, which resulted in an assault conviction, and he was placed on probation. In 1990, Bailey was charged with three different assault charges, with three different alleged female victims; however, two of these charges were dismissed for failure to prosecute. Renita Brown, the victim from the 1990 assault charge that was not dismissed, claimed that Bailey kicked her in the head and bit her after forcibly entering her apartment. In March of 1993, Bailey was convicted of a third assault, involving Travise Woodley, which resulted in a suspended sentence that was later revoked. As stated by the prosecutor, the third assault was “almost the exact same behavior that we have in [the instant] case.” Bailey “entered the victim’s workplace and started to curse at her. She tried to get away from him, and he struck her in the face several times and then fled the scene . . .” In September of 1993, when Bailey was on probation for the March 1993 conviction, he was convicted of his fourth assault, involving Darlene Cash. The affidavit of complaint stated that Bailey “beat [Ms. Cash] in the face with his fist.” Bailey pled guilty, and the Court sentenced him to serve six months in jail. In June of 2005, Bailey was convicted of his fifth assault, involving Kimberly Tate, one of the victims in the instant case. The prosecutor detailed the facts relating to Bailey’s 2005 assault on Ms. Tate:

[T]his defendant approached her in a parking lot in a vehicle, trying to get Ms. Tate to talk to him. She refused, and he struck her from behind, causing injuries to her

cheek and caused [sic] her to fall to the ground. She had visible injuries to her face. The very same victim.

Following this conviction, Bailey was placed on probation in August 2005, and then five months later committed the crime in this case involving Ms. Snyder and Ms. Tate, which revoked the probation that he received for his 2005 assault on Ms. Tate. The prosecutor stressed that Bailey's pattern of domestic abuse required a denial of alternative sentencing:

[T]his man is a serial domestic violence abuser as evidenced by this record. We've got different victims. We've got [a] similar type of behavior and assaultive conduct.

I know the statute makes him eligible – presumed probatable . . . . But the statutes also say the penitentiary is reserved for the most dangerous type offenders and those that have the most significant history.

We suggest that . . . this is the very type of person that . . . 40-35-103 . . . is designed to send to the penitentiary. He's had probation on . . . domestic violence assault convictions, and he continues to assault women.

[T]he State's position, without hesitation, is that this man be required to serve this effective ten-year sentence in the Department of Corrections [sic] to protect – probably Ms. Tate. He's assaulted her now twice – but [also to protect] any other women [with whom] he may come in contact . . . .

In closing, Bailey's attorney asserted that the twelve-year gap between the assaults and Bailey's participation in anger management treatment showed that Bailey had made significant efforts to change his behavior. He also noted that Tate, the second victim, received no serious injuries. Finally, he contended that because Bailey had never been convicted of a prior felony, and because he was pleading guilty to two Class C felonies, he was "presumed probatable."

At the close of the sentencing hearing, the trial court denied the Bailey's request for probation and sentenced him, in accordance with his guilty plea agreement, to an effective sentence of ten years at thirty percent as a Range I, standard offender.

### **ANALYSIS**

Bailey contends that the trial court erred in failing to grant his request for alternative sentencing. In particular, Bailey argues that he was eligible for alternative sentencing pursuant to Tennessee Code Annotated sections 40-35-102 (2006) and 40-35-303 (2006) and that the trial court erroneously denied any form of alternative sentencing, especially recognizing that Bailey's prior convictions were misdemeanors that occurred twelve years ago. Additionally, Bailey argues that because the trial court failed to apply the sentencing considerations found in Tennessee Code Annotated sections 40-35-102 and -103 (2006), this Court must review this matter without a presumption that the trial court's judgment was correct.

On appeal, we must review issues regarding the length and manner of service of a sentence de novo with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d)

(2006). Nevertheless, “the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The defendant, not the State, has the burden of showing the impropriety of the sentence. T.C.A. § 40-35-401(d) (2006), Sentencing Commission Comments.

Any sentence that does not involve complete confinement is an alternative sentence. See generally State v. Fields, 40 S.W.3d 435 (Tenn. 2001). A trial court, when sentencing a defendant or determining alternative sentencing, must consider the following:

- (1) The evidence, if any, received at the trial and the sentencing hearing;
- (2) The presentence report;
- (3) The principles of sentencing and arguments as to sentencing alternatives;
- (4) The nature and characteristics of the criminal conduct involved;
- (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
- (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and
- (7) Any statement the defendant wishes to make in the defendant’s own behalf about sentencing.

T.C.A. § 40-35-210(b) (2006); see also State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002); State v. Osborne, 251 S.W.3d 1, 24 (Tenn. Crim. App. 2007).

Tennessee Code Annotated section 40-35-102(5) (2006) gives courts guidance about the types of individuals who should be required to serve their sentence in confinement:

In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure to past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration[.]

Bailey contends that because he was convicted of two Class C felonies, he is considered to be a good candidate for probation under Tennessee Code Annotated section 40-35-102(6) (2006), which states that a defendant who does not require confinement under subsection (5) and “who is an especially mitigated or standard offender convicted of a Class C, D, or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” However, subsection (6) also states that “a court shall consider, but is not bound by, this advisory sentencing guideline.” Id.

In addition, Bailey argues that because his total sentence is ten years, he is an eligible candidate for alternative sentencing under Tennessee Code Annotated section 40-35-303(a) (2006), which states, “A defendant shall be eligible for probation under the provisions of this chapter, if the sentence actually imposed upon the defendant is ten (10) years or less.” However, it is important

to note that “the burden for establishing suitability for probation rests with the defendant.” T.C.A. § 40-35-303(b) (2006). Also, despite Bailey’s eligibility for probation under the aforementioned section, “the defendant is not automatically entitled to probation as a matter of law.” T.C.A. § 40-35-303(b) (2006), Sentencing Commission Comments.

In determining whether a defendant should be required to serve a sentence of confinement, the trial court must consider if:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1)(A) - (C) (2006). See also Ashby, 823 S.W.2d at 169.

The trial court considered the presentence report, the enhanced probation report, the exhibits, and the testimony of Ms. Snyder. Regarding Ms. Snyder’s testimony, the court stated, “I have no reason to doubt anything she testified to about the trauma that she has suffered from these injuries.” The court underscored the senselessness of Bailey’s assaults against Ms. Snyder and Ms. Tate: “These were two women in a public place that appeared to be completely unarmed that were attacked for no . . . reason at all. Nothing would justify attacking these two women with a . . . wooden object that was . . . about the size of a rolling pin . . . . [T]hese are serious offenses. They are violent offenses.” In addition, the trial court addressed the appellant’s proof regarding his anger management training: “Certainly Mr. Bailey has gotten himself into some treatment, [and] he has some records showing [that] it [was] successful. But I think under the facts of this case that is not sufficient.” Ultimately, the court denied Bailey’s request for alternative sentencing and stated:

It is the finding of the Court that he is not entitled to any presumption for alternative sentencing because of the offense involved, certainly [he] has a disregard for the laws and morals of society. At the time he committed this offense, he was supposed to be restrained by an order of protection. That did not seem to bother him. He was on probation at the time. That did not seem to bother him. Certainly he had committed these types of offenses in the past.

When you look at his record, there is a gap between the earlier series of assaults and these most recent series of assaults. But it appears clear to the Court that past efforts at rehabilitation have failed so . . . the Court is not going to apply [the] presumption of alternative sentencing.

When I look to the other sentencing considerations that the legislature has required the Court to look at, one of them is ‘is confinement necessary to avoid depreciating the seriousness of the offense,’ and it would be the finding of the Court that confinement is necessary to avoid depreciating the seriousness of the offense. [Another consideration is if] [c]onfinement is particularly suited to provide an

effective deterrence to others likely to commit similar offenses, and [an additional consideration is if] measures less restrictive than confinement have been applied unsuccessfully to the defendant in the past. Both recently and several times in the past there have been attempts to put this defendant on [probation] and those have failed.

It is the feeling of the Court that this sentence is certainly no greater than what is deserved for the offense.

When the Court applies the various statutory guidelines that the legislature has laid out, it is the finding of the Court that this is an appropriate sentence . . . a ten-year sentence in the Department of [Correction].

Because the trial court considered the sentencing principles and all relevant facts and circumstances, the presumption that the trial court was correct in denying alternative sentencing remains in effect. See Ashby, 823 S.W.2d at 169. Given that the record overwhelmingly justifies confinement, we conclude that the trial court did not erroneously deny Bailey alternative sentencing in this case.

### **CONCLUSION**

We conclude that the trial court properly denied alternative sentencing in this case, thereby requiring Bailey to serve an effective ten-year sentence at thirty percent. Accordingly, the judgments of the trial court are affirmed.

---

CAMILLE R. MCMULLEN, JUDGE